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No. 87-852

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

VS.

SIERRA CLUB,
Respondent.

REPLY TO SIERRA CLUB RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Sierra Club, in its opposition to Union Oil's petition for writ of certiorari, does not meet the first issue presented in Union Oil's petition. Instead, Sierra Club rewrites the first issue and then argues against the issue it presents. Sierra Club also misses the mark on Union Oil's second issue. Its arguments reinforce the need for plenary review by this Court.[1]

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[1] Union Oil recently filed a motion to defer consideration of its petition for writ of certiorari pending reconsideration of federal court jurisdiction over all or part of this case in light of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 56 U.S.L.W. 4017 (1987). Because of the Court's subsequent request for this reply, Union Oil has deferred filing its motion to dismiss in United States District Court pending the outcome of Union Oil's petition for writ of certiorari.

A. Sierra Club Focuses On The EPA-Created Upset Defense Instead of Addressing Union Oil's Fundamental Statutory Issue Which Affects All Permittees Under The Clean Water Act.

1. The issue Union Oil raises is simple: does the Clean Water Act allow a permittee to be excused for exceeding its permit limits where extreme or unusual acts of nature caused the exceedance? Sierra Club chooses not to meet that issue, but instead revises the issue to address the EPA-created defense, found in 40 C.F.R. Section 122.41(n). Sierra Club fixes its argument, including six of its seven reasons for denying the writ, on the issue it substitutes for that raised by Union Oil. Union Oil, however, does not raise the issue or application of the EPA-created defense. Union Oil's question is broader: it goes to the scope of liability established by the Clean Water Act.[2]

2. The issue Union Oil raises is separate from and independent of the EPA-created defense in 40 C.F.R. Section 122.41(n). The EPA-created defense was established to address the operating failures that inevitably occur during normal conditions; the defense Union Oil raises goes to exceedances due to abnormal natural conditions.[3] The EPA-created upset defense does not

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[2] Union Oil conducted the case below relying on the EPA-created upset defense. It prevailed on that defense in the District Court and lost before the Court of Appeals. Upon further consideration, Union Oil realized that the issue in this case is more fundamental: the real issue is whether the Clean Water Act holds a permittee liable for extreme or unusual acts of nature. The EPA-created defense was not established to respond to this issue. (See paragraph 2 of Part A of this reply.) Therefore, regardless of the presence or absence of the EPA-created defense in this permit, the issue is whether the Clean Water Act excuses permit exceedances due to extreme or unusual acts of nature. Although that issue was not directly addressed below, it may be considered for the reasons stated in paragraphs 3 through 6 of this Part.

[3] EPA established the upset provisions of 40 C.F.R. Section 122.41(n) at the direction of the Court in *Marathon Oil Company v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977). The Court there reviewed EPA's "best practicable technology" regulations, which set standards based on the best performance achievable in normal

reach the unusual natural conditions; it does not identify or set requirements pertinent to the consequences of hurricanes, tornadoes, severe storms, droughts, earthquakes and other unusual natural events. Instead, it focuses on routine matters in daily operation, like preventive maintenance, operational error, and careless operation. 40 C.F.R. Section 122.41(n), reprinted at Pet. App. F.[4] Thus, the EPA-created defense is limited in scope and does not reach the situation here. Moreover, it is not the exclusive defense available under the Clean Water Act.[5]

3. Union Oil raises this issue in response to the decision of the Court of Appeals below. The United States Court of Appeals for the Ninth Circuit interprets the Clean Water Act to prohibit permit exceedances due to an unusual natural event, if the unusual natural event is likely to occur over the life of the plant.

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operations. Data reflecting poor performance due to unusual natural events, such as hurricanes or tornadoes, were generally discarded from consideration in setting best practicable technology standards. *See e.g.*, 40 Fed. Reg. 21946 col. 3 (May 20, 1975); 40 Fed. Reg. 21942, col. 1 (May 20, 1975). Even so, EPA's technological data showed that the standard it had set in the best practicable technology regulation at issue could not be achieved, even with the most exemplary performance under normal operating conditions, more than 97-99% of the time. Because EPA nevertheless required compliance 100% of the time, the Court found EPA exceeded its authority for establishing best practicable technology regulations under the Clean Water Act by requiring more than was achievable. EPA remedied this flaw in its regulation by establishing an upset provision for the best practicable technology regulations. EPA structured the upset provision as an affirmative defense to alleged permit violations.

[4] "Pet. App." refers to the appendix to Union Oil's petition for writ of certiorari. "Response" refers to Sierra Club's response in opposition to Union Oil's petition for writ of certiorari. In all other respects, this reply employs the same usages as the petition.

[5] To the extent that the EPA-created upset defense does apply to these kinds of rainfall events, the Court should grant certiorari, reverse the Court of Appeals' holding that the upset defense was unavailable to Union Oil, and find that the Court of Appeals' reversal of the District Court's findings of fact on whether Union Oil met the upset defense, constituted plain error.

Pet. App. at A-16 and A-17. Although the Court of Appeals' conclusion was submerged in a discussion of the EPA-created upset defense, this Court may nevertheless consider the resulting issue Union Oil raises because it is important, it is a legal issue, and the facts necessary to resolve this issue are not in dispute. *See e.g., Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 698-699 (1984); *Vance v. Terrazas,* 444 U.S. 252, 259 n.5 (1980). Furthermore, the issue fairly reflects the central circumstances in this case; extraordinary rainfall, consisting of two six-month winter seasons in a row, each constituting a hundred-year rainfall event, resulted in approximately fifty permit exceedances. These central circumstances fairly raise the question whether the Clean Water Act allows a permittee to be excused for exceeding its permit limits where extreme or unusual acts of nature caused the exceedance.

4. The issue is important because it may affect every permit under the Clean Water Act. According to the Court of Appeals' decision, permittees should design their pollution control systems to function normally despite extreme or unusual acts of nature, if those unusual events are likely to occur over the life of the facility. Most facilities operate in areas occasionally subject to extreme or unusual acts of nature which are likely to occur over the life of the facility. The east and gulf coasts suffer from hurricanes, the midwest from tornadoes, and the west coast is prone to earthquakes. All areas may experience exceptionally severe storms. If permittees do not design their facilities to accommodate the stresses of extreme or unusual natural conditions, they may be subject to enforcement action, civil or criminal.[6] 33 U.S.C. Section 1319. In such enforcement suits, permittees could not successfully defend on grounds that extreme or unusual acts of nature had caused the permit exceedances because, in the Court of Appeals' view, the problem would not be the extreme events, but the inadequacy of the facility to meet the extreme events. The potential liability for exceedances due to

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[6] The Clean Water Act provides criminal penalties, including imprisonment of responsible corporate officers, for willful or negligent violation of permit terms. 33 U.S.C. Section 1319(c).

extreme natural occurrences would thus fall on tens of thousands of permittees.

5. The issue is legal: it raises the intended scope of a permittee's liability under the Clean Water Act. The inquiry is whether Congress intended to impose absolute liability on permittees under the Clean Water Act, making them responsible for the consequences of extreme or unusual acts of nature. The inquiry may extend to interpretation of the permit terms, and the regulations on which those terms are based, to determine whether they seek to impose liability on permittees for extreme or unusual acts of nature. Even in this extension, the issue is one of legal interpretation.

6. The facts necessary to resolve this issue are not in dispute. The key fact is that there were exceptionally heavy and unusual rains which resulted in permit exceedances. Sierra Club suggests otherwise, Response at 4-5, but Sierra Club simply quarrels with the record. Both the District Court and the Court of Appeals agreed on this key fact. The District Court found "the winters of 1981 to 1982 and 1982 to 1983 produced exceptionally heavy rainfall, causing widespread flooding and property damage." Pet. App. at A-31. The Court of Appeals similarly characterized the rains as "heavy rainfall", "heavy rains", and "unusual rains". Pet. App. at A-16 and A-17. The Court of Appeals did not reverse the District Court on this factual finding; instead, it disagreed on whether Union Oil was liable for the consequences of the heavy and unusual rains.[7] Only Sierra Club still tries to argue that there were no unusual rains in the winters of 1981-82 and 1982-83; but Sierra Club is both wrong and too late.[8] The factual finding of

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[7] The Court of Appeals' disagreement with the District Court was predicated on a differing interpretation of the legal responsibilities and liabilities of permittees under the Clean Water Act. Had it been no more than a differing factual conclusion, the Court of Appeals would have committed plain error in reversing the District Court's finding of fact on causation.

[8] Sierra Club tries to minimize the severity of these rainstorms, neglecting to mention that its own expert testified on cross-examination that the winter season storms were hundred-year rainfall events:

exceptional or unusual rains is undisturbed; the question left for the Court is the legal question of a permittee's liability for the consequences of extreme or unusual natural occurrences.

B. Sierra Club Offers No Reason Why A Permittee May Not Introduce Evidence In Its Defense In A Clean Water Act Enforcement Suit, Except To Say It Would Complicate The Suit By Requiring The District Court To Determine The Facts; This Reason Does Not Overcome The Permittee's Constitutional Rights.

1. The Court of Appeals held the Clean Water Act bars a permittee from showing at trial that an exceedance reported in the permittee's self-monitoring report was an error. Pet. App. at A-20 and A-21. The Court so held even though the permittee reported the error, together with the exceedance, in its self-monitoring report. The Court of Appeals misinterpreted the law. The Clean Water Act neither states nor implies that an exceedance in a monthly monitoring report is conclusive evidence of a violation and may not be explained, rebutted or in any way disproved at trial. The Clean Water Act did not create such an irrebuttable

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> The Court: So what you are saying is that the rain for that six-month period was a rain that occurred once every hundred years?
>
> Question: Statistically that's right, isn't it, doctor?
>
> Answer: Yes. [5 Tr. at 614 (Dr. Schroeder)].

Sierra Club's attempt to tie the exceedances only to unusually severe daily storms, Response at 4-5, is also inappropriate because the stress of a season of storms on bacteria in a bioplant is cumulative. The bacteria do not have the capability to renew themselves every 24 hours. The fact that the winter season constituted a hundred-year rainfall event is far more significant for the operation of the bioplant than that the rain on any particular day was or was not itself unusual. It is the combined effect of the rain and cold that caused these problems. Although Sierra Club goes so far as to suggest the drop in temperature associated with the rains did not contribute to the violations, Response at 4, the witness to whose testimony Sierra Club refers in fact testified most clearly: "it's a given the water is going to be colder going to the bioplant during a rain storm. I am saying that it's also a given that reduced temperatures slow the rate of biological activity in a bioplant." 4 Tr. 526 (Dr. Stone).

presumption; if it did, it would violate due process. *See* Petition at 13-17.

2. Sierra Club responds by asserting that the monthly monitoring report is an admission, that a permittee may not impeach its own admission, and, therefore, that a ban on evidence holds no constitutional flaw. Sierra Club's reasoning does not support its conclusion, even if a monitoring report is viewed as an admission, because a party may introduce evidence to clarify or respond to an admission. *E.g., Albert Hanson Lumber Company v. United States,* 261 U.S. 581,589 (1923). The ban is not against including evidence, but against excluding evidence by establishing irrebuttable presumptions in the absence of compelling reasons. *E.g., United States v. Provident Trust Company,* 291 U.S. 272, 281-282 (1934).

3. Sierra Club's argument rests on erroneous facts. Sierra Club implies Union Oil did not stand behind its reports and sought to impeach them. To the contrary, Union Oil proved at trial what its monitoring reports stated on their face for five of the seven exceedances at issue: that the reported exceedances were invalid because of sampling errors or calculation variabilities.[9] The April 15, 1983 self-monitoring report, for example, noted two exceptionally high results and stated:

> "Both excesses were reported . . . on the following day. On each occasion, repeat samples a few hours later and the following day yielded results well within limits. All other measures and observations indicated our treatment plant was operating well and that our effluent was on grade. These settleable solids excesses were traced to sampling problems. We have taken steps to resolve these problems." [Def. Ex. D, reproduced in part in the appendix to this reply.]

Union Oil thus did not impeach its reports; instead, Sierra Club and the Court of Appeals deleted from consideration those parts

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[9] The other two reports do not indicate an exceedance at all, but instead report that meaningful sample results could not be obtained because of laboratory problems.

of the self-monitoring reports which explained the exceedances reported.

4. This issue is significant. The 65,000 permittees under the Clean Water Act file a self-monitoring report each month, reporting numerous measurements and samples. These hundreds of thousands of routine monthly monitoring reports, according to the Court of Appeals decision, constitute conclusive evidence against the permittee in court: those filing the reports are not to be permitted an opportunity to explain the circumstances of any errors in the testing or in the reporting. Denying a person his day in court is a classic deprivation of due process. It should not be implied as a requirement of the Clean Water Act, nor tolerated here.

Respectfully submitted,

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February, 1988.

Appendix

[UNION LETTERHEAD]

April 15, 1983 WNS-102

Regional Water Quality Control Board
San Francisco Bay Region
1111 Jackson Street, Room 6040
Oakland, California 94607

Attention Mr. Fred H. Dierker

Gentlemen:

Attached is the March 1983 monthly report on the Self-Monitoring Program for Union's San Francisco Refinery.

The Refinery was in compliance with all limits with the exception of two high settleable solids results for Station E-002, 8.8 ml/1-hr on March 1 and 1.3 ml/1-hr on March 28. The two high daily values resulted in a monthly average of 1.14 ml/1-hr, exceeding the monthly average limit.

Both excesses were reported to RWQCB on the following day. On each occasion, repeat samples a few hours later and on the following day yielded results well within limits. All other measures and observations indicated our treatment plant was operating well and that our effluent was on grade. These settleable solids excesses were traced to sampling problems. We have taken steps to resolve these problems.

The information contained herein is correct to the best of my knowledge and belief.

Very truly yours,

/s/ W. N. Stark
Manager

DMGinosar/lo
Attachment
cc: Environmental Protection Agency
bc: M. J. Dougherty/Dr. C. B. Scott
Messrs. G. O. Dyke/F. A. Swingle
Circulate: J. R. Dietzman
F. R. Bottomley
S. D. Smith
D. M. Ginosar
A. L. Felderman
D. W. DeBuse

STATION E-002
GRAB SAMPLES

Mo. Mar. Yr. 1983 Date	Sample Time	Flow Rate mgd	pH Units	Settleable Solids ml/1-hr.	Sulfide Total		Flow Rate Ave. 3 Sx. mgd	Oil & Grease				
								Time			Ave	Ave*
					mg/1	Kg/day		mg/1	mg/1	mg/1	mg/1	Kg/day
	6:00A	3.46	—	8.8				6:00A	8:00A	10:00A		
	10:00A	3.46		0.01								
1	8:25A	5.29			0.04	0.80	3.69	36.7	5.8	6.0	16.2	226
	9:00A	5.06		0.01								
3	—	—	—	—	—	—	—	—	—	—	—	—
	6:00A	2.30	—	0.03				6:00A	8:00A	10:00A		
9	2:15P	2.53			0.04	0.38	2.07	8.6	13.0	13.9	11.8	92
14	6:00A	6.91	7.1	0.01				6:00A	8:00A	10:00A		
16	11:00A	3.00	—	—	0.02	0.23	4.99	17.8	29.8	11.3	19.6	370
	6:00A	7.60	7.1	0.02				6:00A	8:00A	10:00A		
22	2:25P	4.61			0.02	0.34	6.69	23.4	8.8	8.4	13.5	342
	6:00A	2.45		1.30				6:00A	8:00A	10:00A		
	11:12A	2.76			0.02	0.21						
28	2:00P	—		0.02			2.27	9.2	10.7	9.7	9.9	85
29	1:00P	2.30		0.02								
No. of Samples			2	9	5						15	
Min.			7.1	0.01	0.02	0.21					9.9	85
Ave.			7.1	1.14	0.03	0.39					14.2	223
Max.			7.1	8.80	0.04	0.80					19.6	370

* Loading values calculated from average flow rate.